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No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY, *Petitioner*

vs.

JOSEPH D. NUNAN,
Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Preliminary Statement

The position of the Respondent, in its brief in opposition, in its statement of the case, and in its statement of the question presented, as well as in its argument respecting the importance of the question involved and the conflict of decisions, in the face of its own Petition for a Writ of Certiorari, in *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62, can not be justified.

When this Court upheld the statute involved herein, in *Anniston Mfg. Co.* v. *Davis*, 301, U. S. 337, the decision was based on the equity which this Court believed to be inherent in the statute—equitable principles applied *against* the taxpayer's contentions. Petitioner has urged (Pet. pp. 22-23) that these equitable principles, properly applied, require that the Government, after a claim has been examined on the merits, be not permitted to lead a taxpayer beyond the statutory period of limitations, when it can then shamelessly rely on a technicality, which could have been readily cured earlier, to the irremedial loss of the taxpayer.

To this the Court below replied:

> "It makes no difference to the taxpayer what was his mistake; . . . he awakes to learn that it is never safe to put his trust in officials. . . . The result is often extremely harsh, as this case shows; but he who deals with the government must dot his i's and cross his t's; and if he assumes that he may rely upon the ordinary rules which apply as between individuals, he is doomed to disappointment."

Indeed, this is a sad commentary on our system of justice, the law and equity, if this is true.

Taking its cue from this view of the fairness which exists in dealings between the Government and its people, Respondent has begged the question, instead of stating it, has stated the facts so that inferences contrary to the facts known to it to be true may be drawn, and has deliberately argued against

the reasons for granting the writ, contrary to the facts and the law.

2. Question Presented

The question presented is:

Whether the Petitioner may maintain its suit for refund (on the merits), where the claim for refund contained the nature of the claim but not the data in support thereof, and where the Commissioner, through an examination of the claim on the merits by a deputy collector, learned the facts and obtained the basic data which, if presented in the claim, should have caused a refund. (Pet. p. 3.)

This is the very question which was presented in *United States* v. *Memphis Cotton Oil Co., supra,* (App. C, p. 17) (and which went unanswered, p. 73) as this Court will see from Appendix C.

Respondent, to avoid this embarrassment, has stated the question, as follows:

> "Whether the Tax Court erred in dismissing the proceeding for lack of jurisdiction where the petitioner's claims for refund of processing taxes failed to comply with the requirements of Section 903 of the Revenue Act of 1936, as amended, and applicable Treasury Regulations promulgated thereunder or the information called for on Form P. T. 79, and such defects had not been waived by the Commissioner of Internal Revenue." (Resp. Br., p. 2).

The statement of the question presented—as set forth by the Respondent—obviously begs the ques-

tion—for the question *is*—did the Commissioner in effect waive the defects of the claim, on the facts known to Respondent and presented below, and *not*—is the case to be dismissed, because the Commissioner failed *actually and in terms* to waive the defects of the formal claim.

The question may be restated, as follows:

Congress imposed a tax (whether called a processing tax, a manufacturer's tax, an excise tax, or anything else), which was declared to be unconstitutional. Congress then imposed the condition to any refund that the taxpayer-claimant prove that he sustained the economic burden of the tax, under regulations to be prescribed by the Treasury Department. In the formal claim for refund filed, petitioner failed to comply with all of the requirements respecting the proof that it sustained the economic burden of the tax, *but* it did so when the claim was examined on the merits, *before* the statute of limitations had run, the respondent at no time complaining of the defect in the claim. *After* it was too late to amend—respondent rejected the claim, partly on the merits, not involved herein, and partly on the technical ground that the formal claim was deficient. The simple question then is—does the examination of the claim on the merits, under the circumstances set forth in detail in the Petition for a Writ of Certiorari, constitute a waiver of the defects in the claim, or may the Government prolong investigations and reviews, until it is too late to amend, so that the claimant who sustained the burden of the tax may not prove that fact and obtain the refund?

If the answer is that the Commissioner of Internal Revenue may thus cut off proof on the merits, whether inadvertently or intentionally, equity jurisprudence has failed in its purpose, and the principles upon which *Anniston Mfg. Co.* v. *Davis*, supra, is based are quite meaningless, except to cut off the rights of an uninformed taxpayer.

Nowhere in its brief in opposition does respondent deny, even by inference, that the Commissioner, at the time of the rejection, had all of the data and knew all of the facts which he would have had and known, had the claim been complete, or had the claim been amended so as to make it complete prior to its rejection. This fact, asserted by petitioner, may then be deemed to be true. The question then is—did the Commissioner waive the defects of the claim?

3. Statement

In commenting upon the claims filed by Petitioner, Respondent has called attention to the fact that the claims on Form 843 (R. 11-19), and the claim on Form 79 (R. 20-29), attached to the Petition as Exhibits, are *unsigned*. (Respondent's Brief, p. 5, line 5, p. 6, line 1.) The natural inference is that these claims were never properly signed. The fact is, of course, that the original claims, properly signed, are in Respondent's files.

Respondent then goes on to say about the claim (Resp. Br., p. 6, lines 6-9):

> "It does not purport to be a claim by or on behalf of the petitioner for any amount and does

not indicate that any part of the amount claimed had been paid by petitioner."

Respondent knows that petitioner and Niagara Falls Milling Company had a common set of books, common officers (R. 125) and a common bank account. Respondent has known this since 1933. (R. 113.) It knew it in 1938. (R. 127.) Respondent has known that Petitioner was a processor of wheat, and, as such, *liable* for the processing tax, since 1933. (R. 113.) Respondent has known that petitioner has claimed a refund of tax paid since 1936. (R. 11.) Whether petitioner was the taxpayer, by reason of the payment of tax for which it was liable, out of its common bank account, by a common officer, is a question of fact to be proved on the merits. Knowing the facts, it is indeed with bad grace that respondent continues to inject this question, when the courts below ignored it. It can only be for the sake of raising inferences that will cloud the issue presented and make the case look the more complicated.

At page 13, Respondent cites numerous decisions to the effect that a claim for refund must be filed by the person liable for, and who paid, the tax. Admittedly. Well, petitioner filed returns, and when it did not, they were filed for it, and the tax was paid out of its monies, from a joint account, by an officer of two companies. It was liable for tax and paid it. Respondent contends otherwise, but petitioner is prepared to prove the facts in a trial on the merits. Are these assertions and innuendoes, by respondent, to

preclude petitioner from such a trial, all in the name of Government?

4. Reasons for Granting the Writ

(a) *The question involved DOES present a question of importance in the administration of the revenue laws.*

Respondent has denied this assertion on the grounds (1) that the requirements of the statute involved are not necessary in the *ordinary* claim for refund of other revenue taxes and (2) that the decisions below are based upon the failure of the petitioner to present the necessary and required date in support of its claim. Respondent then goes further to say that the question has already been resolved against the petitioner by this Court, in *United States* vs. *Memphis Cotton Oil Co., supra.*

Not one of these assertions is true, nor do they approach a correct and fair statement, without qualifications that would make the statements, when analyzed, absurd.

Title VII of the Revenue Act of 1936, was an enlargement of Section 21(d) of the Agricultural Adjustment Act of May 12, 1933, as amended by Section 30, Public 320, 74th Congress, August 24, 1935, which in turn, was an adaptation of Section 424 of the Revenue Act of 1928.

Since 1928, there have been *substantially* similar statutory requirements that, to support a refund, the taxpayer must prove he sustained the economic burden of the tax. Such requirements still exist as to retailers' excise taxes, in section 2407 (b) of the In-

ternal Revenue Code, and as to manufacturers' excise and import taxes, in section 3443 (d) of the Code.

Again, the Commissioner is applying the very same requirements in connection with claims for refund of excess profits taxes, of which there are thousands, under Section 722 of the Code. See *Blum Folding Paper Box Company*, awaiting decision of the Tax Court of the United States, docket 5854.

Finally, whether or not the statute involved contains the specific requirements involved herein, any claimant for refund must, with the claim *or* later, submit all of the data upon which he relies. In substance, there is, in reality, no difference in the total requirements of a claimant for refund, under the decisions, whether the claim be for the refund of processing tax or of income tax. The only reason for respondent's making a distinction here is because the Courts generally have had an abhorrence of processing tax cases.

The Court below did not base its decision on Petitioner's failure to present "the necessary data in support of its claim." It based its decision on Petitioner's failure to do so *at the time the claim was filed*. The fact is that Respondent actually had every bit of the required data, at the time of the rejection, and Respondent has never denied this to be the fact. It is this fact which Petitioner urges has cured the defects in the formal claim. The consideration of the claim on the merits, the Commissioner having all of the data which the claim lacked, prior to the running of the statute of limitations, is petitioner's

basis for asserting that any defect in the formal claim was waived.

The question so presented was *not* resolved in *United States* v. *Memphis Cotton Oil Co., supra,* as the last sentence in the opinion of this Court clearly shows. The Court below was wrong if it so asserted. This question was left unanswered. It should be answered now, in *this* case.

Respondent, in the *Memphis Cotton Oil* case, represented to this Court that this question was of great importance *in 1932.* (App. C, p. 22.) It is still of importance, whether a processing tax, or an income tax, be involved. For respondent to urge otherwise lacks every element of fairness to a particular taxpayer, in a case it has won, instead of losing, and of frankness to this Court.

What makes the question of less importance, when taxpayer petitions than when the Solicitor General does?

(b) *There IS an actual conflict of decisions of the Courts which this Court should resolve.*

Again, respondent gives several reasons for denying this assertion, namely: (1) the cases relied upon do not involve the processing tax; (2) in the cases cited, by petitioner, there was a waiver of the claim, or "all the facts were before the Commissioner," (Resp. Br., p. 16); (3) the claim was decided on the merits and the Commissioner had determined the amount of the over-payment; and (4) there is no conflict to be based on the Court of Claims' decision in *Memphis Cotton Oil Co.* v. *United States,* 59 F. 2nd 276. (Resp. Br., p. 15.)

The fact that the cases relied upon involve income tax and not the processing tax is of no significance. The question is far broader. The issue is—given the facts of this case—irrespective of the kind of tax involved—has the Commissioner waived the formal defects of the claim filed? If he has, the claimant is entitled to a trial on the merits.

Secondly, all of the facts and all of the data were before the Commissioner. While the Commissioner did not say—"I waive the defects in the claim"—he had all of the facts, and he considered the claim on the merits. That is obvious from the fact that he held that petitioner was not the taxpayer, as well as from uncontradicted affidavits. (Tr. 126-129, App. B.) These facts, in and of themselves, constitute a waiver similar to the waivers in the cases cited in the Petition. (pp. 18-19.)

The instant claim was considered on the merits. The fact that the Commissioner did not find the amount of overpayment, in the instant case, is of no more significance than the fact that he did not do so, before the *Memphis Cotton Oil Co.* case went to the Court of Claims. The existence or non-existence of this fact has not been of significance in any of the cases previously decided against the Government.

Finally, the *Memphis Cotton Oil* case, as decided by the Court of Claims, is in direct conflict with the decision below. No clearer conflict could exist. The statement of Respondent to the contrary (Br., p. 15) could be justified, only if the decision had been reversed. True, the decision was affirmed on other grounds. However, until it is reversed, that decision

stands as the law in the Court of Claims, whether or not the Government acquiesces in it. That will be the law in the Court of Claims, just as the decision below will be the law in the Circuit Court of Appeals for the Second Circuit, until this Court resolves the question. The affirmance on other grounds, in the *Memphis Cotton Oil* case, might take away some of the force of the decision in the Court of Claims, if this Court had not said that the question decided by the Court of Claims was not being decided by it. (p. 73.) Even then, however, the law of the Court of Claims would still be in direct conflict with the views of the Court below, which treated this Court's decision in the *Memphis Cotton Oil* case as though the question decided by the Court of Claims had been decided by this Court, and as though the decision of the Court of Claims had been reversed.

There is a conflict today, if there was one in 1932, when the Government filed its Petition for a Writ of Certiorari in the *Memphis Cotton Oil* case (App. C.) There *is* a conflict of decisions, the Government's argument to the contrary, notwithstanding.

CONCLUSION

It is respectfully submitted that the question involved herein is of great general importance and that the decisions of the courts are in conflict. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PREW SAVOY,
Attorney for Petitioner.

December, 1944.